PUBLIC PROSECUTOR

v.

FRASER & NEAVE (M) SDN. BHD.

HIGH COURT MALAYA, SHAH ALAM
MAHADEV SHANKAR J
[CIVIL PROCEEDINGS NO. 51-230-87]
29 DECEMBER 1989

FOOD AND DRUGS: *Contaminated F & N bottle of aerated water - Retailer did not buy directly from supplier - Whether strict liability offence - Prosecution to show that the bottle was in fact manufactured by F & N - Onus on defendants - Meaning of 'who sells' - Reasonable steps - Examination of line of people involved in sale - Sale of Food and Drugs Ordinance 1952, ss. 11(1)(g), (4), 17, 21.*

On 27 June 1985, S bought 48 bottles of aerated water from a shop in Petaling Jaya, out of which 24 were labelled F & N. Some of these F & N bottles contained soda water. On 1 July 1985 S took out a soda water bottle which she had kept in her fridge at home. As she was about to open it, she noticed that it contained some foreign matter. On closer examination she thought they were dead ants. On 3 July 1985, the said bottle was submitted by the MPPJ to the government chemist, who found a cluster of dead ants covered with saprophytic fungal growth inside the bottle. He also found the lip of the bottle to be slightly chipped and the cap was flat and undented. He opened it with the usual opener and found no fizz.

As the shop in Petaling Jaya did not buy their supplies from F & N but from a certain B, who was not called to give evidence, there was no direct evidence at the close of the prosecution case whether the particular bottle of soda water had in fact been manufactured by F & N, and if so when, and if in fact it had been sold by them to B. The only material evidence was that the bottle had an F & N label.

In the Court below, the learned Magistrate was satisfied that s. 21 of the Sale of Food & Drugs Ordinance 1952 (the Ordinance) applied and that F & N had taken all reasonable steps to prevent the offence.

This was the prosecution's appeal against F & N's acquittal, arguing that the offence under s. 11(1) of the Sale of Food & Drugs Ordinance 1952 (the Ordinance) was one of strict liability.

Held:

[1] Section 11(1) of the Ordinance only creates an offence against any person "who sells". There was absolutely no evidence that F & N had sold this bottle of soda. Besides, to charge a person with manufacturing and selling in the same charge would appear to be duplicitous. Section 21 specifically states that whilst it is no defence that the defendant did not act wilfully, it is a defence if he also proves that he took all reasonable steps to ascertain that the sale of the article would not constitute an offence against the Ordinance.

[2] A bottle may be genuine but its contents may not have originated from the manufacturer's factory but in some infringer's backyard. Consequently in such cases it makes sense to investigate the whole line of people involved in the selling of the spurious article and charge them unless they can show that what they sold was something which had originated from the manufacturer.

[3] The gaps in the prosecution evidence as to when the shop in Petaling Jaya bought it from B, whether B had bought it from F & N and if so when, the failure to adduce evidence whether the bottle had been 'unopened' after it first left the F & N factory, whether F & N had in fact filled this particular bottle with its contents and what the liquid in the bottle was, left F & N in a position where it could only do its best to show that all reasonable steps were taken to ascertain that the sale of the bottle would not constitute an offence against the Ordinance. F & N's onus in law was to show a defence on the balance of probabilities only. On the facts of this case, F & N had easily discharged that onus.

[Appeal dismissed.]

Cases referred to:
Lindley v. George W. Horner & Co. Ltd. [1950] 1 All ER 234 ***(cit)***
PP v. Pengurus, Rich Food Products Sdn. Bhd. [1982] 1 MLJ 302 ***(cit)***

Legislation referred to:
Sale of Food and Drugs Ordinance 1952, ss. 11(1)(g), (4), 17, 21
Food and Drugs Act 1938 [UK], s. 3(1)

For the appellant - Ibrahim Taib, DPP
For the respondent - Porres Royan; M/s. Shook Lin & Bok

JUDGMENT

Mahadev Shankar J:

This is an appeal against the acquittal of Fraser & Neave (M) Sdn. Bhd. (F & N) for an offence under the Sale of Food & Drugs Ordinance 1952 (the Ordinance).

On 27 June 1985 Mrs. D.M.Scott bought two crates of aerated water from Cheong Huat (Convenience Store) in P. Jaya. The soft drinks in question were contained in forty-eight bottles out of which twenty four were labelled F & N. Some of the bottles labelled F & N contained soda water. Mrs. Scott put a selection of soft drinks into her fridge after she got home. On 1 July 1985 she took out a soda water bottle from her fridge. As she was about to open it, she noticed it contained some foreign matter. On closer examination she thought they were dead ants. She took the bottle to M.P.P.J. the next day and made a report to the Health Inspector. On 3 July 1985 he submitted the bottle and contents to the government chemist, who found a cluster of dead ants covered with saprophytic fungal growth inside the bottle. He also found the lip of the bottle to be slightly chipped. The cap was flat and undented. He had opened it with a usual opener and found no fizz. So no tests were done to establish its carbon dioxide content. Mrs. Scott and her retailer were both recalled for further cross-examination before the close of the prosecution case. Further evidence was then adduced that Mrs. Scott had applied some pressure in attempting to open the bottle; but had not actually got to taking the cap off. On seeing the dead ants she stopped, leaving the cap on. Immediately she examined other bottles in her possession. These were not contaminated. Mrs. Scott's retail shop proprietor had not bought her supply from F & N at all but from somebody called Ban Yoon who was not called to give evidence. Consequently there was no direct evidence at the close of prosecution case if this particular bottle of soda water had in fact been manufactured by F & N, and if so when, and if in fact it had been sold by them to Ban Yoon. The only material evidence therefore was that the bottle had an F & N label.

After hearing a submission of no case the learned Magistrate called for the defence, on the charge, which was in that contravention of s. 11(1)(g) of the Ordinance, F & N had at Cheong Huat's retail store, on 27 June 1985 manufactured and sold food to the prejudice of Mrs. Scott to wit a bottle of soda water which was not of the nature of food demanded by the purchaser and thereby committed an offence under s. 11(4) of the Ordinance.

The defendants relied on system. F & N bought new bottles from K.L. Glass Bhd. They also used "empties" from the open market. These were first visually inspected for suitability. Then they were fed on slab conveyors into a mechanical washer which cleaned out the bottles in a nine-stage operation. The bottles were pre-rinsed with water, pre-heated, repeatedly soaked under high pressure with a hot caustic solution and then repeatedly rinsed out again under hot and cold water.

Then the bottles were both visually and electronically inspected for damage before the contents were filled in and the bottles capped and stacked for delivery to the open market.

The production manager of F & N gave evidence to this effect after the learned Magistrate had visited the factory.

The production manager said that a chipped bottle of the kind tendered in evidence would not have passed their inspection processes. It was evident that the most tenacious colony of ants would not have survived the kind of washing processes to which F & N subjected their bottles.

The Magistrate was satisfied that s. 21 of the Ordinance applied, that is, that all reasonable steps had been taken to prevent an offence.

In this appeal the learned DPP relied on *Lindley v. George W. Horner & Co. Ltd.* [1950] 1 ALL ER 234. He submitted that the offence was one of strict liability, and the Magistrate should therefore have convicted.

With respect, it should first of all be noted that although s. 11(1)(g) of our Ordinance has some similarity in wording to s. 3(1) of the English Food and Drugs Act 1938 (the Act) s. 4(1)(4) of the Act which provides a defence in the U.K. and s. 21 of our Ordinance are very differently worded. Lord Goddard CJ held in *Lindley's* case that the English offence was one of strict liability because that is the effect of the words of the English statute. Extraneous matter in food does not create criminal liability in the U.K. only if its presence is an unavoidable consequence of the process of collection or preparation.

Under our law s. 21 specifically states that whilst it is no defence that the defendant did not act wilfully it is a defence if he also proves that he took all reasonable steps to ascertain that the sale of the article would not constitute an offence against the Ordinance.

In the present case the learned Magistrate held that the burden on the defence had been discharged. Besides as Mr. Poress Royan has pointed out there is Malaysian case law that ours is not a strict liability offence: See *PP v. Pengurus, Rich Food Products Sdn. Bhd.* [1982] 1 MLJ 302.

With respect to Counsel for both parties there are some other aspects of this case which calls for comment.

The charge averred that there was a contravention of s. 11(1)(g) of the Ordinance in that F & N "did manufacture **and** sell food...". But s. 11(1) of the Ordinance only creates an offence against any person "who **sells** ...". There was absolutely no evidence that F & N had sold

this bottle of soda. Besides to charge a person with manufacturing and selling in the same charge would appear to make for duplicity.

Section 17 of the Ordinance provides that where food in connection with which there is a breach of any provisions of this Ordinance is sold in any unopened package, any person who appears from any statement thereon "... to have manufactured or prepared such food or to have enclosed it in such package shall, unless he proves the contrary, be deemed to have ... manufactured prepared or enclosed ... the same ... and shall be liable to the same penalty as if he had actually sold the same."

In the twenty-eight years which have gone by, since this law was passed in 1952, the manufacturers of spurious goods have significantly increased. A bottle may be genuine but its contents may not have originated from the manufacturer's factory but in some infringer's backyard. Consequently it seems to me that in such cases it makes sense to investigate the whole line of people involved in the selling of the spurious article and charge them unless they can show that what they sold was something which had originated from the manufacturer.

In the present case the train of events taken backwards in time, was as follows. Cheong Huat sold the bottle of "soda water" to Mrs. Scott on 27 June 1985. But there was no evidence:

(a) when Cheong Huat got it from Ban Yoon;

(b) that Ban Yoon had bought it from F & N, and if so when;

(c) that the bottle had been "unopened" after it first laft F & N's factory;

(d) that F & N had in fact filled this particular bottle with its contents;

(e) what the liquid in the bottle in fact was.

The learned DPP's complaint is that F & N did not prove that the system upon which they relied at the time of the trial was in existence when the bottle was filled. This problem arose because it was not possible to say merely by looking at the bottle or the cap, if and when it left the F & N factory.

Thus s. 17 puts the manufacturer in an invidious position because it requires the Court to invoke a rebuttable presumption from a mere label on the bottle that it is F & N who put the liquid in the bottle. Although Cheong Fatt sold it, F & N is also deemed from the label to have filled it. So F & N are to be liable to the same penalty, as if F & N had actually sold the bottle unless they rebut the prosecution case.

Taking an overview of the matter I hold that the gaps in the prosecution evidence earlier referred to left F & N in a position where it could only do its best to show that all reasonable steps were taken to ascertain that the sale of the bottle would not constitute an offence against the Ordinance. That onus in law was one to show a defence on the balance of probabilities only. On the facts of this case, it was easily discharged.

I therefore dismiss this appeal.

Also found at [1991] 3 CLJ 2548